Filed 9/25/12 Marriage of Moneke CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of VICTOR and QUEEN MONEKE.	
VICTOR C. MONEKE, Appellant, v. QUEEN N. MONEKE, Respondent.	E053876 (Super.Ct.No. FAMVS802741) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Robert J. Lemkau and Debra Harris, Judges.* Affirmed.

Law Office of James Bruce Minton, James Bruce Minton; Arias & Lockwood and Christopher D. Lockwood for Appellant.

Law Offices of Valerie Ross and Valerie Ross for Respondent.

* Judge Lemkau presided over the trial and made the oral judgment. Judge Harris presided over the hearing of April 21, 2011, and signed the judgment.

Queen N. Moneke and Victor C. Moneke[1] were married for over four years. After they were married, Victor opened his own obstetrics and gynecology (OB/GYN) practice in Apple Valley. In dividing the assets, Queen was awarded the monetary value for one-half of the OB/GYN practice. Victor could not pay the lump sum owed to Queen and was ordered to pay $5,000 per month at 10 percent interest until the debt was paid.

Victor now appeals the dissolution and separation of assets on the following grounds:

1. The trial court improperly permitted the valuation date for his OB/GYN practice to be at the time Victor and Queen separated (or soon thereafter) rather than at the time of trial as required by Family Code section 2552.[2]

2. The trial court erred by concluding that the OB/GYN practice was entirely community property, because Victor's medical license, training, and education should have been considered his separate property for which he should have been compensated.

3. The trial court failed to adjust the temporary spousal support payments and award him an offset payment for the overpayment.

4. The trial court's award of 10 percent interest rate on payments was punitive.

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[1] We will refer to the parties by their first names, not out of disrespect, but to avoid confusion. (*In re Marriage of Ramirez* (2008) 165 Cal.App.4th 751, 753, fn. 1 [Fourth Dist., Div. Two].)

[2] All further statutory references are to the Family Code unless otherwise indicated.

I

FACTUAL AND PROCEDURAL BACKGROUND

Victor was born in Nigeria. He obtained his medical license in Nigeria and completed an internship and residency as part of his training. In 1992, Victor took the required tests in order to practice in the United States. In 1994, he was certified to work in the United States. He started a practice in New York.

Victor was married while living in New York to a woman named Ngozi. When they divorced, Victor was ordered to pay child support for his four children until they were the age of 22 years and to pay for half of their education.

In 2003, Victor was contacted by St. Mary's Hospital in Apple Valley, recruiting him to start a practice in the area. Between 2003 and 2004, he worked to receive the appropriate license to practice in California.

Victor married Queen on February 14, 2004. He started the OB/GYN practice on June 6, 2005. Queen had come to the United States in 2003 and had never worked. Victor did not want her to work, and she kept up the house by cleaning and cooking. Queen never had any credit cards or checks and made no financial decisions.

Queen and Victor separated on October 17, 2008. A petition for dissolution was filed on October 29, 2008, and the case was bifurcated. A judgment of dissolution was entered on January 6, 2010, with the reserved issues of property distribution and spousal support to be decided later. Victor was ordered to pay Queen $6,131 per month in temporary spousal support commencing December 1, 2009. He was making the payments. The only issues remaining for trial were the division of property, including a

home; Victor's OB/GYN practice; household furniture, furnishings, and personal property; and the calculation of spousal support.

Gregory Wiebe, a certified public accountant, was appointed as an evaluator to determine the value of Victor's practice. Wiebe spoke with Victor regarding his practice and reviewed several documents and sources of information that were commonly used in valuing medical practices. At trial, Wiebe estimated the value of the practice to be $291,500 as of December 31, 2008. Wiebe looked to both 2007 and 2008 practice years in determining the value of the practice. The goodwill of the practice was $131, 250.

A dissolution order and judgment on the reserved issues was filed on April 21, 2011. The order outlined the division of personal property, cars, the home, and furnishings. As for the OB/GYN practice, the trial court accepted the value of the practice to be $291,500 as provided in Wiebe's report. Queen was awarded $142,250. The amount was to be paid in monthly installments plus 10 percent interest commencing on October 1, 2010, until it was paid in full. Victor was ordered to pay to Queen $3,500 per month in spousal support commencing on September 1, 2010, and continuing until March 31, 2011. Temporary spousal support from December 1, 2008, to August 30, 2010, was not to be modified.

On June 16, 2011, Victor filed his notice of appeal.

II

VALUATION DATE FOR MEDICAL PRACTICE

Victor contends that the trial court erred by accepting Wiebe's valuation date of December 31, 2008, for his OB/GYN practice, rather than the value at the time of trial.

He claims that Queen's failure to comply with section 2552, subdivision (b) by filing a motion 30 days prior to trial to change the date of valuation to the separation date bars the trial court's application of an earlier valuation date.

A. *Additional Factual Background*

According to Victor's trial brief, the parties were separated on October 17, 2008, and a petition for divorce was filed on October 29, 2008. Wiebe was appointed on January 6, 2009.

In January 2010, Wiebe issued his draft report and released it to the parties so that they could make any objections to the report. In the report, the valuation date for the practice was set at December 31, 2008. Trial began on August 18, 2010. At trial and in his pleadings, Victor presented evidence that the value of his OB/GYN practice had decreased since December 31, 2008. Those details are not relevant to the decision here.

In his points and authorities filed on August 25, 2010, Victor argued that the valuation of the practice should be as near as practicable to the time of trial, relying on section 2552. He argued that, in order for the trial court to consider an alternative date, a motion must have been made by Queen 30 days prior to trial and good cause must be shown to change the date. Queen responded that, since the medical practice was a professional practice, the date of separation was the appropriate valuation date.

At trial, Wiebe testified that he released a draft report with the valuation date of December 31, 2008, to the parties in January 2010. Wiebe was asked if valuation of the OB/GYN practice was to be at the time of separation or close to the time of trial. Wiebe

responded that for a personal service business, it was best to value the practice as close to separation as possible because services rendered after separation were separate property.

The trial court tentatively ruled that the valuation date was at the time of separation. It stated, "[T]he testimony from Mr. Wiebe concurs with the Court's for purposes of the nature of this business would be date of separation obviously, you could have a situation where following date of separation the owner of the business drives the business into the ground and on the day of trial it's worth nothing and therefore it could be a deliberate attempt on the part of an individual to waste the asset. [¶] On the other hand, if the business increases in value substantially as a result of extraordinary effort on the part of the separated individual, shouldn't he not receive the benefit of that? So it would seem to the Court that in accordance with Mr. Wiebe's testimony the date of separation or at least no later than the date of December 31st, 2008 is the date for the evaluation of the practice."

Later, in making its final ruling, the trial court found that "the date of valuation should be date of separation." It further held, "I think the law is clear on that as well. Otherwise you have a wasting of assets therefore the valuation as of December 31, 2008, which is $291,500 and half of that is $145, 750, which would be Queen Moneke's share of the practice."

B. *Analysis*

We review a trial court's ruling dividing property for abuse of discretion. (*In re Marriage of Dellaria & Blickman–Dellaria* (2009) 172 Cal.App.4th 196, 201.) "Factual findings are upheld if supported by substantial evidence. [Citation.]" (*Ibid.*) Where a

trial court's decision presents a pure question of law, such as interpretation of a statute, we review it de novo. (*Ibid*.)

Section 2552, subdivision (a) provides: "For the purpose of division of the community estate upon dissolution of marriage or legal separation of the parties, except as provided in subdivision (b), the court shall value the assets and liabilities as near as practicable to the time of trial." Subdivision (b) of that section states: "Upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and before trial to accomplish an equal division of the community estate of the parties in an equitable manner."

"When a spouse operates a community property business after separation, there is an inherent tension between the general rule that the business must be valued as of the date of trial [citation] and the rule that a spouse's earnings after separation are his or her separate property. [Citation.]" (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 624.)

"Case law has established that good cause generally exists for a professional practice to be valued as of the date of separation. [Citations.] This exception to trial date valuation applies because the value of such businesses, 'including goodwill, is primarily a reflection of the practitioner's services (accounts receivable and work in progress) and not capital assets such as desks, chairs, law books and computers. Because earnings and accumulations following separation are the spouse's separate property, it follows the community interest should be valued as of the date of separation -- the cutoff date for the

acquisition of community assets.' [Citation.]" (*In re Marriage of Duncan, supra,* 90 Cal.App.4th at pp. 625-626.) "Moreover, '[t]he rationale for the general exception to trial date valuation is not limited to small law practices. It applies with equal logic to other small businesses which rely on the skill and reputation of the spouse who operates them.' [Citation.]" (*Id.* at 626.)

Here, the evidence established that the OB/GYN practice was a professional practice. Victor does not argue otherwise. Moreover, he provides no argument that the trial court's determination that the valuation date at the time of separation was not supported by good cause. Rather, his sole argument is that Queen failed to file the proper noticed motion requesting that the date of separation be applied for good cause under section 2552, subdivision (b).

Family Code section 2552, subdivision (a) states that the trial court "shall" value the assets and liabilities as close to trial as practicable. However, the same mandatory language is not used in Family Code section 2552, subdivision (b); rather, that subdivision states that, upon the filing of a motion and good cause, the trial court has the discretion to change the valuation date to another time. There is nothing in the language of the statute, and Victor has provided no case that holds, that the failure to file the motion precludes the showing of good cause. In *In re Bergman* (1985) 168 Cal.App.3d 742, 760, footnote 15, the appellate court addressed Civil Code section 4800, subdivision (a), which is nearly identical to the language in Family Code section 2552, subdivisions (a) and (b). In addressing one party's failure to file a motion within the 30 days, it held, "[t]he section does not require a noticed motion, just timely notice from the requesting

party to the other party." It further held, "*[a]lthough not required by the statute*, we believe the use of a noticed motion alone is the preferred practice since it results in a determination in advance of trial of whether the request is granted. This helps reduce unnecessary discovery, minimizes the expense of experts in reaching their opinions and, in many cases, will assist in achieving settlement." (*Bergman*, at p. 760, fn. 15, italics added.)

Here, Victor was presented prior to trial (by almost eight months) with the report by Wiebe, an expert appointed by the court, which showed that Wiebe had used the valuation date of December 31, 2008. Victor lodged no objection to the report. At the time of trial, he argued and presented evidence that the value of the asset was presently less than what Wiebe had determined at the time of the separation and that the valuation date should be set at the time of trial. The trial court rejected that argument. Based on the unique facts of this case, Victor was able to present his argument, and the trial court found good cause to find the separation date (or near the separation date) was the proper valuation date. The parties knew the issue that was before them, and Queen should not be penalized for failing to file the formal motion. Victor has not provided any argument as to how he would have presented his case differently had he received the 30 days' notice of a motion by Queen.

Finally, a court has broad discretion to determine the valuation date to accomplish equitable division of community property. (See *Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1430-1431.) The trial court considered the matter carefully and determined the

date close to separation was the proper valuation date. This was not an abuse of the trial court's broad discretion. We perceive no prejudice to Victor.[3]

III

EDUCATION AND TRAINING OBTAINED PRIOR TO MARRIAGE AS SEPARATE PROPERTY

Victor contends that the trial court should have found that his education and training to become a doctor prior to his marriage to Queen were his separate property for which he should have been compensated.

A. *Additional Factual Background*

Throughout the proceedings below, Victor argued that his education and training prior to the marriage were his separate property for which he should be compensated. Victor specifically argued that his training and education were separate property required to purchase the medical practice. Victor argued, "This is a Court of equity, not a Court of law, but one of fairness. If the Court finds that Dr. Moneke's education, training and experience of over 20 years has no value and should not be considered, I believe that would be an error. I believe that would be inequitable. That is the only asset put into this practice."

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[3] Victor complains that Wiebe picked an arbitrary date of December 31, 2008, rather than the date of separation, which was October 17, 2008. However, Victor provides no argument or evidence that the value of the business changed between October 17, 2008, and December 31, 2008. Moreover, section 2552, subdivision (b) provides only that a date after separation or before trial can be chosen.

The trial court responded, "The law is clear, that since the medical practice was commenced after the date of marriage that the practice is in fact, a solely community asset." It found that this was not a new area of the law. It concluded, "The law is clear and the Court's opinion [is] that the Court cannot give in this scenario value to the educational background and experience of Dr. Moneke."

B. *Analysis*

Family Code section 2641 (formerly Civ. Code, § 4800.3) requires reimbursement to the community for expenditures made for education and training during a marriage. This remedied the injustice that often occurred when a couple separated shortly after graduation before the education could benefit the community. (*In re Marriage of Watt* (1989) 214 Cal.App.3d 340, 354-355.) However, the court in *Watt* rejected that a medical degree was community property subject to division; only community expenditures toward the education could be reimbursed. (*Id.* at p 355.)

In *Todd v. Todd* (1969) 272 Cal.App.2d 786, a case decided prior to Family Code section 2641 and Civil Code section 4800.3, the trial court had stated that the value of education was "'nothing $ -0--,'" despite the community paying for a portion of the legal education. (*Todd*, at p. 790.) The appellate court held, "If a spouse's education preparing him for the practice of law can be said to be 'community property,' a proposition which is extremely doubtful even though the education is acquired with community moneys, it manifestly is of such a character that a monetary value for division with the other spouse cannot be placed upon it." (*Id.* at p. 791.) It concluded, "At best, education is an

intangible property right, the value of which, because of its character, cannot have a monetary value placed upon it for division between spouses." (*Ibid.*)

In *In re Marriage of Aufmuth* (1979) 89 Cal.App.3d 446, disapproved on other grounds in *In re Marriage of Lucas* (1980) 27 Cal.3d 808, 815, the court considered the wife's argument that the husband's legal education should be valued as a community asset. (*Aufmuth*, at p. 460.) The appellate court rejected that a professional education was community property. It held, "It is well established that the word 'property,' as used in the statutes relating to community property, does not encompass every property right acquired by either husband or wife during marriage, such as the right to practice a profession. [Citation.]" (*Id*. at p. 461.)

These cases have equal applicability to the consideration of an education (be it medical or legal) obtained prior to marriage as separate property. It is nearly impossible to establish a division of such professional license, as such "intangible property" cannot have a "monetary value placed upon it." (*Todd v. Todd*, *supra*, 272 Cal.App.2d at p. 791.) The trial court did not abuse its discretion by concluding that Victor's education and training prior to the marriage were not his separate property for which he was entitled to compensation.

V

PAYMENT FOR OVERPAID TEMPORARY SPOUSAL SUPPORT

Victor complains that the dissolution order was incorrect because it failed to award him the $3,800 he claims he overpaid in temporary spousal support.

On January 6, 2009, the parties appeared in court regarding temporary spousal support. Victor had not included in his income and expense declaration that he was still paying something on the New York divorce decree. The trial court (Judge Teresa S. Bennett) agreed that she would consider adjusting the amount once the information was provided. Victor was ordered to pay $6,593 per month to Queen.

At the time of trial, the parties discussed the recapture of past overpayment of spousal support in front of Judge Robert J. Lemkau. Victor argued that they had shown during trial evidence that he was not only paying Queen spousal support, but he was also making payments on the New York divorce decree. The temporary spousal support that had been paid to Queen should be reduced, and he should be reimbursed. Queen initially argued that $6,131 was the appropriate spousal support based on factors of equalization. She then stated that the amount for 2009 should have been $5,940 per month.

The trial court first stated that it was not inclined to adjust the support order. Victor's counsel responded that even Queen had calculated that it was probably overpaid by $200 per month. The trial court then calculated that the overpayment was $190 for 20 months, which would total $3,800. Victor did not agree with the amount. The trial court then stated, "I will agree to that reduction, $3,800, okay?" Victor then went on to address the duration of permanent spousal support.

When the trial court ruled on permanent spousal support, it made the following order: "Taking into consideration the $3,800 reduction and applying that to future support and recognizing the 3320 factors, the Court will set support ongoing. This taking into consideration the $3,800 reduction of $3,500 a month through March 31st of next

year, and this is effective September the 1st." The trial court clarified that support was going to be $3,500 per month until March 31, 2011.

On April 21, 2011, the parties appeared in front of Judge Debra Harris. The parties disagreed on the interpretation of the transcript and whether the amount should be reduced by $3,500 for the overpaid temporary spousal support. Queen argued that the transcript provided that the spousal support was going to continue to March 31, 2011, and it was being reduced to $3,500, which took into account the $3,800 overpaid.

Victor argued that the issue involved the payment of temporary spousal support from the period of December 1, 2008, through August 30, 2010. There was no offset for the $3,800, and it needed to be reflected in reducing the amount given to Queen. Queen argued that the permanent spousal support was cut almost in half from the temporary support. The transcript was clear that the previous trial judge reduced the permanent spousal support in recognition of the overpaid temporary spousal support.

The trial court ruled, "[W]e have to apply the plain meaning to the words that were used and it's very clear that he took into consideration and applied it to the future support for a limited amount and had it been forever, then that would have destroyed that analysis."

Based on our review of the record, the transcript clearly provides that Judge Lemkau considered the $3,800 overpayment in setting the permanent spousal support at $3,500. As stated by Queen, this reduced the spousal support by almost half. Victor is not entitled to any additional payment of $3,800.

V

INTEREST RATE ON EQUALIZATION PAYMENTS

Victor complains that the trial court could not set the interest on the installment payments he was making to Queen at 10 percent, but rather it had to set the amount of interest at the market rate.

A. *Additional Factual Background*

After the trial court ruled that the amount that was owed to Queen for the OB/GYN practice was $142,250, Victor stated that he could not pay the lump sum. Victor's counsel asked, "Does the Court have a proposal on how that is to be paid?" Queen's counsel stated that she was willing to have the amount paid over a three-year period. Victor wanted to pay monthly.

Victor proposed paying $5,000 per month. The trial court responded, "If it's payable at 5,000 a month, it should be plus 10 percent interest." Victor objected arguing that "[t]here's no 10 percent interest anywhere." Queen's counsel argued that the "the legal interest rate" was 10 percent. The trial court ruled, "5,000 a month plus 10 percent legal interest effective the 1st of October," and "[m]ore than 30 days in arrear, the whole amount is due and payable."

B. *Analysis*

"Courts have discretion to use promissory notes for relatively short periods at reasonable interest rates." (*In re Marriage of Bergman, supra,* 168 Cal.App.3d,at p. 761.) In *In re Marriage of Stallcup* (1979) 97 Cal.App.3d 294, the court held, "Husband's claim of error in the 10 percent interest figure assigned by the court to the

unpaid balance on installments due to wife is also without merit. Marital property dispositions are not limited by the judgment interest rate of 7 percent,[4] but are controlled by the dictates of fairness and equity in Civil Code section 4800. [Citation.]" (*Id*. at p. 302.)[5] A 10 percent interest rate on equalization payments has been upheld in numerous cases. (See, e.g., *In re Marriage of Bergman, supra,* 168 Cal.App.3d at pp. 762-763; *In re Marriage of Escamilla* (1982) 127 Cal.App.3d 963, 967; *In re Marriage of Slater* (1979) 100 Cal.App.3d 241, 248.) None of these cases (or the cases cited by Victor) *require* that the trial court consider the market interest rate or that it would be an abuse of discretion to order a 10 percent interest rate. They merely address the equal division of property.

Although Victor did not execute a promissory note, the cases above are applicable. The amount of the interest rate imposed on payments adequately compensates Queen for the delay in receiving her share of the community property. The trial court did not abuse its discretion by awarding Queen payments of $5,000 per month at 10 percent interest.

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[4] Article 15, section 1 of the California Constitution provides in pertinent part that "[t]he rate of interest upon the loan or forbearance of any money, goods, or things in action, or on accounts after demand, shall be 7 percent per annum . . . ."

[5] Although *Stallcup* was decided under the former Civil Code section 4800, "most of the relevant Civil Code sections were repealed and reenacted in Family Code section 3800 et seq. without substantive change, effective January 1, 1994. (See Stats.1992, ch. 162, § 10.)" (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 804, fn. 2)

VI

DISPOSITION

The judgment is affirmed. In the interests of justice, each party shall bear his or her own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.